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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

JOVITO A. ANGELES, Plaintiff and Respondent, v. JEANNIE A. ARMOREDA, Defendant and Appellant.	A103996 (San Mateo County Super. Ct. No. F057348)

Jeannie A. Armoreda (Mother) appeals from an order granting the application of Jovito A. Angeles (Father) to change the name of their then four-year-old son from Jacob Miguel Armoreda to Jacob Armoreda Angeles. Father has filed no responding brief in this court. There being no evidence in the record that this name change is in Jacob's best interests, we reverse the order.

Background

The two parties are the parents of Jacob, born in 1998. The parties were never married and never lived together with Jacob as a family. The record reflects that when Jacob was born and Mother asked Father if he wished to choose the child's name, Father was "completely indifferent" and the name given to the child and placed on the birth certificate was Jacob Miguel Armoreda. Mother has had physical custody of Jacob since birth. On November 8, 1999, however, Father filed a petition to establish his parental relationship with Jacob. Mother acknowledged Father's paternity, but opposed other requests concerning visitation and other matters. In March 2000, an order was entered

after a hearing awarding joint legal custody to the parties and sole physical custody to Mother, with Father having defined visitation rights and the obligation to pay child support.

In June 2002, Father filed a motion seeking modifications of the custody and support provisions. The application also requested other relief, and included the following statement: "I also want my son to have my surname." The supporting declaration stated Father wanted "50/50 custody" because he "wish[ed] to spend more time with my son. He will be 4 soon and the additional time with me will only assist in his development." He requested a reduction of child support because he had married and had another child and a mortgage obligation. With respect to the name change, the declaration repeated, "I also want my son to have my surname." Mother filed a response describing in some detail communication and cooperation issues between the parties concerning Jacob, opposing many of Father's requests, and agreeing to a modification of support. Her declaration also described developmental problems that Jacob was experiencing and his need for special assistance in social and language skills. With respect to Jacob's surname, her declaration read: "[Father] keeps revisiting this issue. The court has denied his request twice, both times without prejudice. I request that this request be denied with prejudice, so that the issue may be put to rest at long last. [Father] and I were never married. Jacob's name on his birth certificate is Jacob Miguel Armoreda. That is the name that the child knows himself by—to change his name would serve only to confuse Jacob. [¶] For months prior to his entering school in March, 2002, I began teaching Jacob his full name. He knows his name is Jacob Miguel Armoreda. [Father], however, insists on teaching Jacob that his name is Jacob Angeles, which is confusing to the child."

The parties met with a family court services mediator in November 2002. Some agreements were reached during the mediation, and the mediator made recommendations to the court with respect to other matters they could not agree upon. With respect to Father's request to change the minor's surname, the report to the court reads: "The minor currently uses the mother's last name. The father stated that he wants to change the

minor's last name to his or to hyphenate it with the mother's last name, because of tradition and because the minor is his child. The mother expressed that she is opposed to this because of structure, i.e., the minor is used to using her name, and because the parents were never married and never lived together." The mediator advised the court that he believed it was not his role to make a recommendation concerning the requested name change, but asked the court to make such a determination.

At the hearing on December 11, 2002, the court indicated that it had reviewed the mediator's report, and no other evidence was received concerning the proposed name change. Mother's attorney directed the court's attention to the points and authorities she had filed in opposition to the change and Father's attorney made the following argument: "The brief reiterates what we all know is in the best interest of this child. What the Court may not know is that this child now has a one-year-old sibling at home with dad. And he's only four years old at this point, although he's had the mother's name since the beginning of birth. It's not impossible to see how this child's going to grow up. He's going to be wondering: I have a sister. How come we have different names? [¶] That may add some more confusion into the child's life." The court responded: "It seems to me if we're going to change the name, then the Court determines that it's in Jacob's best interest to have the same acknowledgement of both these parents. Now is the time to do it and before we start a pattern." Mother's counsel pointed out that Jacob "is already in preschool and in speech therapy and things like that," to which the court further remarked: "It's not essentially a curriculum that would get him through elementary school and middle school and eventually high school. That's all I'm talking about. [¶] If we're going to address it, now is the time to address it. I quite frankly don't see why it would not be, with everything considered, not in Jacob's best interest. And I'm going to approve it." When pressed by Mother's attorney to address each of the factors articulated in *In re Marriage of Schiffman* (1980) 28 Cal.3d 640 (*Schiffman*) as affecting the child's best interests, the court indicated that it had considered all of the applicable factors. This timely appeal followed.

Discussion

In determining whether to grant a parent's request to change a minor's surname, the standard is solely the child's best interests. (*Schiffman, supra,* 28 Cal.3d at p. 647; *Donald J. v. Evna M.* (1978) 81 Cal.App.3d 929, 937.) Former presumptions in favor of the father's name if the parents were married when the child was born, and the mother's name if they were not, have been eliminated. (*Schiffman*, *supra*, at pp. 642-647; *Donald J. v. Evna M.*, *supra*, at pp. 936-937.) Mother overstates her case when she argues that the trial court believed that Father had a presumptive right to have Jacob bear his name and granted the name change without considering Jacob's best interests. The trial court's remarks when granting the motion indicate that the court had the correct standard in mind. Nonetheless, whether such a change is in the child's best interests is a question of fact. (*In re Marriage of Douglass* (1988) 205 Cal.App.3d 1046, 1053-1054.) The court's finding will be sustained if the record contains substantial evidence to support it. (*Id.* at p. 1055; *In re Marriage of McManamy & Templeton* (1993) 14 Cal.App.4th 607, 611.) However, we find no such evidence in this record.

The only evidentiary support for Father's application is the statement contained in his declaration that he wanted his son to have his surname. The mediator's report added only that Father wanted the change "because of tradition and because the minor is his child." These are not adequate reasons; they fall far short of establishing the minor's best interests. (*In re Marriage of McManamy & Templeton*, *supra*, 14 Cal.App.4th at p. 611.) Father's attorney mentioned in argument the concern that Jacob might one day wonder why he had a different name than his half-sister, but such speculation does not provide substantial evidence of the child's best interests. (*In re Marriage of Douglass, supra,* 205 Cal.App.3d at pp. 1054-1055.)

The length of time that the child has used his or her current surname is the initial consideration in determining the best interests of the child. (*Schiffman, supra*, 28 Cal.3d at p. 647.) At the time this matter was before the trial court, Jacob was already four and had learned his name with apparent difficulty. The situation here is most similar to that in *In re Marriage of McManamy & Templeton, supra,* 14 Cal.App.4th 607. There, the trial

court had ordered a change to the surname of the father for a three-year-old based on the father's testimony that the minor "should not be confused about her heritage or the role I play in her life. [The minor] should not have to wonder why her last name is not the same as her father's." (*Id.* at pp. 610-611.) In reversing this order, the Court of Appeal held that this testimony "provided no meaningful link between the proposed name change and [the father's] relationship with his daughter." (*Id.* at p. 611.) The court pointed out that the minor had been known by another name for three years since birth, she had started school, and she spent most of her time with her mother whose name she bore. (*Id.* at p. 610.)

The additional factors that *Schiffman* held to be relevant when the time factor "is negligible because the child is very young" (in that case the name change had been ordered less than four months after birth) include "the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit." (*Schiffman*, *supra*, 28 Cal.3d at p. 647.) These factors apply in this case exactly as they did in *In re Marriage of McManamy & Templeton, supra*, 14 Cal.App.4th 607. Since birth Jacob has lived primarily with his mother and will do so under the court's custody and visitation orders into the foreseeable future. " '[T]he embarrassment or discomfort that a child may experience when he bears a surname different from the rest of his family' should be evaluated." (*Schiffman, supra,* 28 Cal.3d at p. 647.) " '[T]he maternal surname might play a significant role in supporting the mother-child relationship, for example, in the cases . . . *where the custodial mother goes by her birth-given surname*.' " (*Ibid.*)

Justice Mosk concurred in *Schiffman*, expressing the view that there should be a rebuttable presumption in favor of the custodial parent's choice of name. (*Schiffman*, *supra*, 28 Cal.3d at pp. 648-651 (conc. opn. of Mosk, J.).) In supporting this position he pointed out, among other things, that when custody is with the mother, this presumption "would accord due weight to the following factors which heretofore have often been subordinated to the father's interest at the possible expense of the child's welfare: (1) embarrassment to the child when he bears a surname different from that of the parent

with whom he resides; (2) identification of the child as part of the current family unit; (3) support of the mother-child relationship in cases in which the custodial mother uses her birth or previous surname." (*Id.* at pp. 650-651.) Although the majority of the court adopted no such presumption, there was no disagreement over the significance of these factors all of which here, as in *In re Marriage of McManamy & Templeton, supra,* 14 Cal.App.4th 607, militate against a change to the father's surname absent a showing that such a change would be in the child's best interest. "[W]here a child has used a particular surname for a substantial period of time without objection by either natural parent, the court, upon petition of one of the natural parents to change the child's surname over objection of the other natural parent, should exercise its power to change the child's surname reluctantly, and only where the substantial welfare of the child requires the change." (*Donald J. v. Evna M.*, *supra*, 81 Cal.App.3d at p. 937.)

Thus, we conclude the record does not contain substantial evidence to support the order to change Jacob's surname. However, regrettably almost two years have elapsed since the trial court ordered the name change and this court has no knowledge of what may have transpired in the intervening period that might affect what is now in Jacob's best interests. If Jacob has been using his father's surname as the trial court ordered, it may be more damaging to Jacob to revert to his former name than to let the order stand (but we do not imply that this necessarily would be true). If the parties have been treating the order as stayed pending the outcome of this appeal (Code Civ. Proc., § 916; cf. § 917.7), vacating the order will not threaten such harm. Therefore, we reverse and vacate the order from which this appeal has been taken, but we note that our decision is without prejudice to the prompt filing of a renewed motion based on any change of circumstances affecting Jacob's best interests since the entry of the vacated order.

Disposition

That portion of the order made at the hearing on December 11, 2002, and memorialized in the "Findings and Order After Hearing" filed on June 4, 2003, that directs that the minor shall be known as Jacob Armoreda Angeles is reversed.

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Pollak, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.